Supreme Court, U.S.
FILED

98 649 OCT 5 1998

No.

In The

Supreme Court of the United States

October Term, 1998

CARA LINDQUIST,

Petitioner,

vs.

ALAN CONDRA and HORMEL FOODS CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL R. SPYHALSKI
WARREN F. PLUNKETT
WARREN F. PLUNKETT & ASSOCIATES
107 West Oakland Avenue
P.O. Box 463
Austin, MN 55912
(507) 437-2845

MILES W. LORD
Counsel of Record
MILES LORD & ASSOCIATES
600 West 79th Street
P.O. Box 729
Chanhassen, MN 55317-0729
(612) 333-5673

Attorneys for Petitioner

148799

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

34 pp

QUESTION PRESENTED FOR REVIEW

Whether an individual should be classified as an employee for purposes of eligibility to sue under Title VII of the Civil Rights Act of 1964, as amended, when the employer selects the subject of the work, the timing of the work, the site of the work, the length of the work and what duties the individual will perform while at work.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Opinion Below	1
Statement of the Basis of Jurisdiction of the Supreme Court	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. The Opinion Misconstrues *Reid* And *Darden* When It Improperly Restricts Its Analysis To Actual Control Instead Of Right To Control. . .	5
II. The Opinion Further Misconstrues Applicable Federal Law When It Fails To Grant All Inferences And Disputed Facts In Appellant's Favor When Deciding The Question Of Employment Status At The Summary Judgment Phase.	6
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 6, 7

Community for Creative Non Violence v. Reid, 490 U.S. 730 (1989) 4, 5, 6, 8

Daugherty v. Honeywell, Inc., 3 F.3d 1488 (11th Cir. 1993) 7

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) 4, 5, 6, 8

Vizcaino v. Microsoft, 120 F.3d 1006 (9th Cir. 1997), *cert. denied*, (Jan. 26, 1998) 7

Statutes:

28 U.S.C. § 1254 1

42 U.S.C. § 2000e-2(a) 1

42 U.S.C. § 2000e-2(a)(1) 1

42 U.S.C. § 2000e(f) 1

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Eighth Circuit Filed July 6, 1998 .. 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of Minnesota, Third Division Filed May 27, 1997 ..... 7a

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is Appendix A, p 1a. The judgment, memorandum opinion and order of the United States District Court for the District of Minnesota is Appendix B, p. 7a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Eighth Circuit issued its Opinion in this case on July 6, 1998. This petition was filed within 90 days of the Opinion's issuance, and is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, states that

> [I]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a) and (a)(1) (1994).

Title VII also provides that an employee is "an individual employed by an employer." 42 U.S.C. § 2000e(f) (1994).

STATEMENT OF THE CASE

Petitioner was a full-time employee of KSMQ-TV (hereinafter "QTV") in Austin, Minnesota from June 1992 to April 1994. During that time, Hormel's Audio-Visual Services Department utilized the services of QTV in producing internal training and product information videotapes. Petitioner was assigned to approximately nine Hormel shoots during the time she worked for QTV.

Following her resignation from QTV, Petitioner provided service to Hormel through its Audio-Visual Services Department. This work was done between April 1994 and November 1995. For each task, Hormel selected the personnel, the subject and the place of work for each shoot and provided the equipment for each shoot. These shoots involved filming of product information and advertising.

For her services, Petitioner was a paid by Hormel a minimum of $400 per day and $200 per travel day. If her time working exceeded ten hours, Petitioner could charge Hormel an additional $55 per hour over ten hours. Hormel did not deduct employment taxes from her paychecks or allow her to participate in benefit plans.

Petitioner's duties for Hormel were limited to those of a production assistant. Production assistants are also informally referred to as a grip or a gopher in the production industry.

A grip is someone who does whatever needs to be done. Petitioner's duties as a grip included loading the equipment, carrying the equipment, unpacking the equipment and placing it wherever the director wanted it. These duties were carried out under the direction of the shoot supervisor, typically Condra.

With regard to her "specialized" duties, Petitioner's camera duties included running to get things for the camera operator such as fresh tapes or taking down time codes. Her lighting duties included setting up the lights and adjusting them under the direction of the light person until the light person said that they were okay. Her audio duties included holding a microphone and listening for out of the ordinary sounds and reporting those irregularities to the director or the camera operator. Editing of the finished product was generally done by an editing studio in Minneapolis and not by Petitioner.

In providing her services, Petitioner was selected by Condra, as supervisor of the Audio-Visual Services Department, for each shoot she worked. On one such shoot in October of 1993, Condra engaged Petitioner in sexual relations. Petitioner has stated under oath that she felt she had to engage in sexual relations with Condra in order to keep her job.

After that shoot, Condra engaged Petitioner in sexual relations on multiple occasions, including almost every out of town shoot. In addition, Condra engaged Petitioner in sexual relations once or twice a week for about six months in the Hormel Museum in Austin, Minnesota, three or four times a week in the Hormel Annex computer room, a few times a month throughout the two years in the Audio-Visual Services Department's tape library, and two times a week in his vehicles during warm months. Condra concedes that sexual relations did occur.

When Petitioner told Condra that she was no longer willing to grant him sexual favors, Condra discontinued his practice of selecting Petitioner for shoots or other work, including removing her from a shoot that she had already been told she would be working.

On February 5, 1996, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") based on violations of Title VII of the Civil Rights Act of 1964, as amended (hereinafter "Title VII"). Petitioner received a Notice of Right to Sue from the EEOC on February 8, 1996.

Suit was commenced against Respondents in the United States District Court, District of Minnesota alleging violation of Title VII and advancing other state law theories of recovery. Upon completion of discovery, Respondents moved for summary judgment on all theories. Most significant to this Petition was Hormel's claim that Petitioner was an independent contract as a matter of law.

Petitioner opposed the portion of the motion dealing with employment status essentially on two grounds: (1) that the procedural posture of the case on summary judgment prevents finding for Hormel on numerous factors as all inferences and disputed facts must be decided in Petitioner's favor; and (2) that the right to control the means and manner of Petitioner's performance was the predominant factor to be considered under *Community for Creative Non Violence v. Reid*, 490 U.S. 730 (1989) and *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

The uncontradicted evidence established that Hormel selected the subject of the shoot, the time of the shoot, the place of the shoot, the length of the shoot, and what duties Petitioner would perform at the shoot. In addition, it was uncontradicted that Condra or other Hormel personnel were in charge of the shoot at all times.

The district court granted Hormel's motion for summary judgment on May 27, 1997. In its order (Appendix B, p. 17a), the district court concluded that

> [a]lthough Plaintiff may have been closely supervised while performing her "grip" duties, the fact that some elements of Plaintiff's working relationship may resemble an employer/employee relationship does not preclude this Court from finding, under the totality of the circumstances, that Plaintiff worked for Hormel as an independent contractor.

Appendix B, p 18a.

Judgment was entered on May 27, 1997. Petitioner timely appealed to the Eighth Circuit Court of Appeals, which affirmed the district court's judgment.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION MISCONSTRUES *REID* AND *DARDEN* WHEN IT IMPROPERLY RESTRICTS ITS ANALYSIS TO ACTUAL CONTROL INSTEAD OF RIGHT TO CONTROL.

As the Eighth Circuit opinion illustrates, (Appendix A, p. 3a), the right to control the means and manner of worker performance is the factor cited by this Court in its *Reid* and *Darden* opinions. *Darden*, 503 U.S. at 323-4; *Reid*, 490 U.S. at 751. The district court, however, ignored this Court's prior statement of the law and apparently required appellant to prove such actual control as to establish Petitioner as a mindless automaton, blindly following the very specific demands of the supervisor. *See* Appendix B, p. 18a ("Plaintiff does not argue that once she was given direction on how to edit a piece, Condra was telling her what buttons to push"). Many individuals whom were indisputably employees could not meet such a standard.

The district court concedes (*Id.*) that Plaintiff appeared to have been closely supervised on these shoots. The Eighth Circuit, despite finding that it was clear that Hormel provided the equipment, and chose the site and subject of the shoot, found that the level of supervision *actually exercised* by Condra was murky.

This Court has stated quite clearly that it is the hiring party's *right* to control not actual control is the factor to be considered by the fact finding court. *Darden*, 503 U.S. at 323-4; *Reid*, 490 U.S. at 751. The lower courts have arbitrarily enhanced the needed showing by Title VII Plaintiffs by requiring proof of actual control to the exclusion of all autonomous thought. This effort by the lower courts to arbitrarily restrict access to the protections of Title VII must be rejected.

II.

THE OPINION FURTHER MISCONSTRUES APPLICABLE FEDERAL LAW WHEN IT FAILS TO GRANT ALL INFERENCES AND DISPUTED FACTS IN APPELLANT'S FAVOR WHEN DECIDING THE QUESTION OF EMPLOYMENT STATUS AT THE SUMMARY JUDGMENT PHASE.

This Court has repeatedly stated that if a genuine issue as to any material fact exists, summary judgment is improper. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In order to be entitled to a trial, "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 249. This Court has gone even further, however, and stated that "at the summary judgment stage the judge's function is not himself to weigh the evidence

and determine the matter but to determine whether there is a genuine issue for trial." *Id.*

In this case, the district court, clearly weighed the evidence when unable to grant a factor directly to Hormel, stating that "[t]he evidence suggests, however, . . . ," Appendix B, p. 15a, that "the evidence establishes . . ." *Id.*, and that

> [a]lthough Plaintiff may have been closely supervised while performing the 'grip' duties, the fact that some elements of Plaintiff's working relationship may resemble an employer/employee relationship does not preclude this Court from finding, *under the totality of the circumstances*, that Plaintiff worked for Hormel as an independent contractor.

Id. at p. 18a (emphasis added). Quite simply, the district court usurped the Rules of Civil Procedure and this Court's holdings interpreting those Rules by acting as fact finder at the summary judgment stage.

To make matters worse, the Eighth Circuit focuses almost entirely on the facts that Hormel never allowed Petitioner to participate in employee benefit programs and refused to withhold employment taxes, ignoring the simple fact that many cases that turn on the employment status question arise simply because the employer is failing to properly withhold taxes or provide access to benefit plans. *See, e.g., Vizcaino v. Microsoft*, 120 F.3d 1006 (9th Cir. 1997), *cert. denied*, (Jan. 26, 1998); *Daugherty v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993). In so deciding against Petitioner, the Eighth Circuit ignores the simple facts that Hormel chose when Petitioner could work, where she would be working, what she would be doing when she worked, how long she would be working and when the job was done to Hormel's satisfaction.

According to the Eighth Circuit, although somewhat relevant, these factors cannot match up to the fact that Hormel did not provide benefits or deduct taxes. And this on summary judgment when all Petitioner need do is provide some evidence and not all-encompassing proof to support her statement that she is an employee to receive a trial on that issue. The Eighth Circuit has, therefore, clearly overstepped its bounds in acting as a fact finder and in tacitly overruling the *Darden* and *Reid* opinions. Such action cannot be allowed.

CONCLUSION

In the opinion, the Eighth Circuit inexplicably fails to follow the clear dictate of this Court regarding the actual test to be applied when determining when an individual is an employee. To make matters worse, the Eighth Circuit then waters down the test to be applied by negating factors indicating control and using the trump factors of provision of benefits and tax treatment by acting as its own fact finder. The result of this gerrymandering of the test provided by this Court is that the test no longer looks behind the labels applied by the employer to find the true reality of the situation, but merely looks to the label provided by the employer to determine the answer.

The Court should grant *certiorari* to review this important matter. Following that review, this Court should reverse the Eighth Circuit and order that Respondents' motion for summary judgment on this issue be denied.

Respectfully submitted,

MILES W. LORD
Counsel of Record
MILES LORD & ASSOCIATES
600 West 79th Street
P.O. Box 729
Chanhassen, MN 55317-0729
(612) 333-5673

PAUL R. SPYHALSKI
WARREN F. PLUNKETT
WARREN F. PLUNKETT
& ASSOCIATES
107 West Oakland Avenue
P.O. Box 463
Austin, MN 55912
(507) 437-2845

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 6, 1998

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-2833

Cara Lindquist,

Appellant,

v.

Alan Condra and Hormel Foods Corporation,

Appellees.

Appeal from the United States District Court for the District of Minnesota

[UNPUBLISHED]

Submitted: March 13, 1998
Filed: July 6, 1998

Before WOLLMAN and HANSEN, Circuit Judges, and GOLDBERG,[1] District Judge.

PER CURIAM.

---

1. The Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

Appendix A

Cara Lindquist appeals from an order of the district court[2] granting summary judgment in favor of Alan Condra and Hormel Foods Corporation in this sexual harassment and sex discrimination action. Because the district court found that Lindquist was not an employee of Hormel, but instead an independent contractor, it concluded that Lindquist was not entitled to sue under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et. seq.* (1994) ("Title VII"). On appeal, Lindquist argues that the district court ignored the extent to which Hormel controlled the means and the manner of her work performance, and in doing so committed reversible error. We affirm the judgment of the district court.

Lindquist's professional relationship with Hormel began while she was fully employed at QTV Productions, a department of KSMQ-TV in Austin, Minnesota. At some point during her tenure at QTV Productions, Hormel hired QTV Productions to help produce certain internal training and product information videotapes. QTV Productions staffed Lindquist on approximately eight of these projects. It was in this context that Lindquist first began to work with Condra. At that time, Condra was the supervisor of Hormel's Audio-Visual Services Department. Part of his job responsibilities included deciding when outside assistance was needed for a videotape project and, if needed, which independent contractor would be used.

In April 1994, Lindquist resigned from her position at QTV Productions. However, she continued to work intermittently on a free-lance basis for Hormel until November 1995. During this period of roughly 600 days, Lindquist worked on ten projects which were completed over a total of twenty-eight days.

---

2. The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

She billed Hormel on a purchase order/invoice basis for each day of work or travel. Between July 1994 and April 1995, Lindquist was also a full-time employee at KAAL-TV in Austin, Minnesota.

In October 1993, while Lindquist was still employed at QTV Productions, Condra and Lindquist began a sexual relationship. The nature of this relationship is in dispute. While Condra describes it as consensual, Lindquist characterizes it as sexual harassment. The relationship ended in October 1995. Subsequently, Lindquist was not chosen to work on a project for Hormel in which she had expressed interest. She responded by filing this suit in the district court. Her complaint raises both federal and state law claims and seeks the recovery of punitive damages. Specifically she alleges that she was the victim of sexual harassment and sexual discrimination in violation of both Title VII and the Minnesota Human Rights Act, Minn. Stat. §363.03, Subds. 1(2)(c) and 14, and that she was the victim of assault and battery.

Hormel moved for summary judgment on all claims, arguing that it was not liable to Lindquist for sexual discrimination under Title VII because she was never an employee of Hormel; she was an independent contractor. The district court agreed. It granted summary judgment on the Title VII claim and declined to exercise jurisdiction over the remaining state law claims, dismissing them without prejudice. This appeal ensued.

Title VII only protects those workers who are also employees from discriminatory employment practices in the workplace. *Wilde v. County of Kandiyohi,* 15 F.3d 103, 104 (8th Cir. 1994). Its protections do not extend to independent

contractors. *Id.* We determine whether an individual is a protected employee or an unprotected independent contractor by examining the working relationship using the common law of agency. *Id.* at 105. In so doing, we consider a number of factors, none of which alone is dispositive. These factors include the "employer's" right to control the means and manner of worker performance; the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; the skill required in the particular occupation; whether the "employer" or the individual furnishes the equipment used and the place of work; the method of payment, whether by time or by the job; the manner in which the work relationship is terminated; whether annual leave is afforded; whether the work is an integral part of the business of the "employer"; whether the individual accrues retirement benefits; whether the "employer" pays social security taxes; and the intent of the parties. *Wilde v. County of Kandiyohi,* 811 F. Supp. 446, 451-52 (D. Minn. 1993), *aff'd,* 15 F.3d 103. We review the district court's determination that Lindquist is an independent contractor *de novo. Birchem v. Knights of Columbus,* 116 F.3d 310, 313 (8th Cir. 1997).

On appeal, Lindquist argues that the district court's assessment of a number of these factors was faulty. In particular, she asserts that, at the very least, there is a genuine issue of material fact regarding her employment status at Hormel because her work for Hormel was menial and closely supervised by Condra; the equipment that she used to complete the projects was provided by Hormel; the subject matter and location of the projects were chosen by Hormel, and her perception of the working relationship was that of employer/employee.

After reviewing the record and considering it in the light most favorable to Lindquist, we cannot agree. As noted above, Lindquist

began working for Hormel indirectly through her employment at QTV Productions. After she resigned from QTV Productions, she continued to work for Hormel intermittently on a project-by-project basis from April 1994 to November 1995. Over this 1 1/2-year period, Lindquist was paid for twenty-eight days of work. She was paid on a purchase order/invoice basis at a flat rate of $400 per day. If the day ran over ten hours, she received an additional $55 per hour. For each day spent traveling to and from a project location, she charged $200. Lindquist submitted the invoices on her own stationary. Hormel paid her by check and, importantly did not withhold federal, state, or FICA taxes from her earnings. Lindquist never accrued any annual leave or retirement benefits, nor did she received health insurance, life insurance, unemployment insurance, or sick leave.

Moreover, there was never an agreement, either written or oral, between Lindquist and Hormel that obligated Hormel to hire Lindquist to work on projects requiring outside assistance. Likewise, Lindquist herself was under no obligation to work on any projects for Hormel. Furthermore, these video projects were ancillary to Hormel's business as a meat manufacturer and distributor. Finally, at no point during her working relationship did Lindquist ever submit a copy of her resume, complete a job application form, or receive a performance evaluation.

In light of these circumstances, we find Lindquist's arguments to be anemic. The evidence regarding the nature of Lindquist's work for Hormel and the level of supervision exercised by Condra is murky, at best. Furthermore, although it is clear that Hormel provided the equipment for Lindquist to use, and chose both the location and subject matter of each project, we are unpersuaded that this alone demonstrates that

Lindquist was Hormel's employee. Finally, apart from her deposition statements that she considered herself to be a Hormel employee, Lindquist has not adduced any evidence to suggest that Hormel and Lindquist intended to create an employee/employer relationship. The district court properly addressed and rejected this contention.

Having considered all of the arguments by Lindquist and finding them to be without merit, we affirm the district court's order granting summary judgment in favor of Condra and Hormel.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION FILED MAY 27, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

File No. 3-96-175

Cara Schulz Lindquist,

Plaintiff,

v.

Alan Condra and Hormel Foods Corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the motion of Defendants Hormel Foods and Alan Condra for summary judgment.

Warren F. Plunkett, Esq., and Paul R. Spyhalski, Esq., for and on behalf of Plaintiff.

Larry A. Hanson, Esq., James E. Blaney, Esq., Claire V. Eagan, Esq., for and on behalf of Defendant Hormel Foods Corporation.

Thomas C. Baudler, Esq., for and on behalf of Defendant Alan Condra.

Appendix B

Plaintiff, Cara Schulz Lindquist, brings this action against Defendants Hormel Foods Corporation ("Hormel") and Alan Condra ("Condra") alleging she was the victim of sexual harassment by Condra, in violation of Title VII, 42 U.S.C. § 2000e-3, and the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363.03, Subds. 1(2)(c) and 14. Plaintiff also asserts a number of state law claims such as assault and battery and a claim for punitive damages. Before the Court are the motions of Hormel and Condra for summary judgment as to all claims. For the reasons set forth below, the Court will grant Defendants' motions in their entirety and dismiss the Complaint.

I. FACTS

Hormel is a corporation headquartered in Austin, Minnesota, that manufactures and distributes meat and grocery products. Hormel has an Audio-Visual Services Department which is responsible for the production of internal training and product information videotapes. Condra was the supervisor of Hormel's Audio-Visual Services Department, and in that capacity supervised three other full-time employees. To assist in the creation of the training and product information videotapes, Hormel regularly contracted with independent contractors. Condra was the individual who made the decisions, on behalf of Hormel, as to when the services of an independent contractor were needed, and which independent contractor would be hired. When an independent contractor was hired, they would be paid on a purchase order and invoice basis.

Plaintiff was employed by QTV Productions from June 1992 through April 1994. QTV Productions is a department of KSMQ-TV. Prior to her employment with QTV Productions, Plaintiff received specialized training and acquired skills in

broadcast journalism while in the military. At QTV Productions, Plaintiff was hired as a Master Control Board Operator, on a full-time, hourly basis. Plaintiff was promoted in December 1992 to a salaried position of associate producer. Hormel hired QTV Productions to assist in the production of certain of its videotape projects. It was in this capacity that Plaintiff began to work with Condra. In April 1994, Plaintiff resigned her position with QTV Productions. While an employee of QTV Productions, Plaintiff was assigned to work on eight projects for Hormel.

From April 1994 until November 1995, Plaintiff worked on ten videotape projects for Hormel's Audio-Visual Department on a purchase order and invoice basis, charging $400 per day. The ten projects were completed over a total of 28 days. In July 1994, Plaintiff accepted full-time employment with KAAL-TV as a news producer. While Plaintiff worked for KAAL, she would do the video projects for Hormel on her own time. In April 1995, she resigned from KAAL rather than be laid off.

Plaintiff and Condra began a sexual relationship in October 1993. Condra describes the relationship as consensual. Plaintiff, on the other hand, describes the relationship as a business deal — I have sex with you and you hire me to do video projects. Throughout the relationship, Plaintiff and Condra videotaped some of their sexual encounters. Plaintiff also sent Condra a number of notes, letters and cards. Some of this correspondence is filled with sexual innuendo, while others convey Plaintiff's love for Condra. During the period of time over which the relationship took place, the sexual trysts took place on a frequent basis — sometimes while the two were out of town on video shoots for Hormel, other times when the two were in town.

Appendix B

On October 18, 1995, Plaintiff called Condra's supervisor Allan Krejci, Director of Public Relations for Hormel, and asked to meet with him. A meeting was held on that same day at which time Plaintiff informed Krejci that she was involved in a two year sexual relationship with Condra that recently terminated. Plaintiff advised Krejci that she wanted to continue to work on video shoots for Hormel, particularly one scheduled to take place in Fremont, Nebraska, but was afraid that may not happen given the circumstances of her relationship with Condra. Krejci told Plaintiff he would look into the matter. Later that same day, Krejci met with Condra. Condra corroborated the fact that he had a sexual relationship with Plaintiff. Krejci told Condra not to contact Plaintiff, but apparently Condra did contact Plaintiff shortly after talking with Krejci. When Krejci returned from lunch that day, he had a voicemail message from Plaintiff stating that she had talked with Condra, and that everything had been resolved to her satisfaction. Thereafter Krejci left a voicemail message for Condra reiterating that he was not to contact Plaintiff. Krejci then met with James Jorgenson, Vice President of Human Resources, regarding his conversations with Plaintiff and with Condra.

On October 23, 1995, Plaintiff called Jorgenson to tell him she was upset that she was not chosen for the Fremont shoot. Jorgenson then contacted Condra and told him to call Plaintiff, and explain to her why she was not selected. Jorgenson further told Condra to utilize Plaintiff in the same capacity as before and to limit their relationship to professional matters. Plaintiff was not chosen for the Fremont shoot, but was issued purchase orders for two other Hormel projects.

On December 13, 1995, Plaintiff informed Hormel managers for the first time of her belief that her sexual

relationship with Condra constituted sexual harassment. As a result of Plaintiff's allegations, Condra was placed on administrative leave while Hormel conducted its investigation into Plaintiff's claims. Hormel states that at the conclusion of its investigation, it determined that Plaintiff's claims were unfounded. Hormel terminated Condra's employment, however, on the basis of insubordination.

Plaintiff filed a charge of discrimination with the EEOC on February 5, 1996, and received her right to sue letter on February 8, 1996. This action was then filed on February 23, 1996. In her Complaint, Plaintiff alleges that she was an employee of Hormel, and that she was a victim of unlawful sexual discrimination by Condra.

II. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56, a moving party is entitled to judgment if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party, in this case the Defendants, bear the initial burden of establishing the non-existence of a genuine issue of material fact. 477 U.S. at 323; *City of Mt. Pleasant, Iowa v. Assn. Elec. Co-op.*, 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party meets that burden, the non-moving party may not then "rest upon the mere allegations or denials of [her] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If, based upon the pleadings or the pleadings with additional evidence, a

reasonable jury could not return a verdict for the non-moving party, judgment at this stage is appropriate. *Id.* at 248.

III. DISCRIMINATION CLAIMS

Plaintiff asserts she was discriminated by Condra based on gender in three ways: quid pro quo discrimination in which her job depended on her engaging in sexual relations with Condra; retaliation for "opposition to Defendants' unethical and illegal conduct," Complaint ¶36; and that Condra's unwelcome conduct constituted sexual harassment and created a hostile work environment.

A. Employment Status under Title VII

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1). "Employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . ." 42 U.S.C. § 2000e(b).

Title VII protects employees from unlawful discrimination. As noted by another court in this District, "[w]hile it is a laudable goal to eliminate discrimination in all business relationships, Congress, in enacting Title VII, undertook the more limited task of eliminating discrimination in employment only." *Wilde v. County of Kandiyohi,* 811 F.Supp. 446, 451 (D.

Minn. 1993) *aff'd*, 15 F.3d 103 (8th Cir. 1994). The statutory definition of "employee" is "an individual employed by an employer . . ." 42 U.S.C. § 2000e(f). An individual who is deemed an independent contractor is not entitled to relief under Title VII. *Wilde*, 15 F.3d at 104. Whether or not a plaintiff is an employee as defined by Title VII is a matter of law. *Wilde*, 15 F.3d at 104.

To determine whether Plaintiff is an employee as defined by Title VII, the Eighth Circuit has adopted what has been referred to as the hybrid test. *Wilde*, 15 F.3d at 106. In applying the hybrid test, the court must focus on the extent to which the employer can control the means and manner of the employee's work performance. *Wilde*, 811 F.Supp. at 451 (*citing, Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.D.C. 1979)). While the control factor is important, it is not dispositive. *Wilde*, 15 F.3d at 104. Other factors that the court must consider under the hybrid test include the following:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, i.e. by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the

worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Wilde, 811 F.Supp. at 451-452. No one factor is determinative, for the court is required to look to the totality of the working relationship. *Id.*, at 452.

Defendants argue that Plaintiff was never one of its employees, therefore, they are not liable to Plaintiff for any alleged discrimination she suffered at the hands of Condra. Defendants assert that application of the hybrid test to the facts of this case establish that Plaintiff was an independent contractor.

1. Kind of occupation — level of supervision required.

Plaintiff was an employee of QTV Productions when she first began working with Condra. Hormel contracted with QTV Productions when it needed technical assistance or equipment. Plaintiff provided technical assistance to Hormel, including editing, production and camera work. Plaintiff continued to provide the same services between April and July 1994, as an independent working on a purchase order/invoice basis. From July 1994 to April 1995, Plaintiff was a News Producer at KAAL-TV. She continued to provide technical services to Hormel on a purchase order/invoice basis on her own time.

Plaintiff asserts that the work she did for Hormel was as a "grip" which is also referred to as "production assistant." Plaintiff describes her duties as moving or unpacking equipment or other nonskilled work. Given the nature of her duties, the Plaintiff argues that the extent to which her work was controlled

or supervised by Condra was great. Plaintiff also argues that her limited editing work was closely supervised by Condra.

The evidence suggests, however, that Plaintiff is downplaying the work she performed for Hormel. She testified at her deposition that she at times did production work but "when it was time to edit it, then I was the editor." Plaintiff Dep. at 192. She also admitted to doing camera work on one shoot, and that only two other people in Austin possessed the skills she had with lighting, and only six to eight others possessed the camera skills she had. Plaintiff Dep. at 177-178. Defendants do not dispute that Condra supervised the shoots. Defendants argue, however, that Plaintiff was allowed to exercise her specialized skills without supervision. In other words, although Condra may have directed the outcome, Plaintiff was allowed to actually perform the editing function on her own. Plaintiff's version of the facts do not refute this contention.

2. Amount of skill required.

Plaintiff received specialized training in production, editing and camera work while in the military and while working for various television stations. Plaintiff does not dispute that specialized training is necessary to perform production, editing and camera functions. While Plaintiff does not dispute that she has specialized skills, she argues she was overqualified for the work performed for Hormel as a "grip." As discussed above, however, the evidence establishes that while Plaintiff did some work as a production assistant, Hormel also utilized her specialized skills on the various shoots.

Appendix B

3. Whether Hormel or Plaintiff furnished equipment or the place of work.

While an employee of QTV Productions, QTV Productions provided editing equipment. After Plaintiff left the employ of QTV Productions, Plaintiff utilized the equipment owned or leased by Hormel.

4. Length of time during which Plaintiff has worked.

After Plaintiff resigned her position at QTV Productions, Plaintiff worked on ten shoots for Hormel from April 1994 to November 1995. From April 1994 to November 1995, which is a 609 day period, Plaintiff worked a total of twenty-eight days on Hormel shoots.

5. Method of payment.

Plaintiff was paid by QTV Productions while in their employ. After April 1994, Plaintiff was paid on a purchase order/invoice basis. She generally charged $400 per day for a ten hour day. If the shoot was longer, Plaintiff would charge $55 per hour, for every hour over ten hours. On travel days, Plaintiff charged $200 per day. After the shoot, Plaintiff would submit an invoice, and be paid by check from Hormel.

6. The manner in which work relationship was terminated.

Hormel hired independent contractors on an intermittent basis for various video shoots. There was no agreement between Hormel and Plaintiff obligating Hormel to hire Plaintiff for a particular shoot, and Plaintiff was not obligated to accept work on a shoot.

Appendix B

7. Whether annual leave was afforded.

Plaintiff did not accrue any paid leave. As part of the benefits package, Hormel employees are able to accrue paid leave for many purposes such as military, family, jury and annual.

8. Whether work is an integral part of the business of Hormel.

Hormel is in the business of manufacturing and distributing meat and grocery products. The work performed by Plaintiff was for the Audio-Visual Department, which was not an integral part of Hormel's business.

9. Retirement benefits.

Plaintiff accumulated no retirement benefits from Hormel.

10. Social Security taxes.

Plaintiff admits Hormel did not withhold Social Security taxes.

11. Intention of the parties.

On this factor, the Court finds that the evidence does not support any intention on the part of Hormel that Plaintiff was its employee. This is especially true during that period when Plaintiff was an employee of QTV Productions. Part of her duties as an employee of QTV Productions was doing contract work for Hormel. Although the work circumstances changed after Plaintiff left QTV Productions, Plaintiff was not treated

as a Hormel employee. Plaintiff worked a sporadic 28 days out of a 609 day period, and was paid on a per day, purchase order/ invoice basis. The form purchase order included language putting Plaintiff on notice that Hormel intended to treat Plaintiff as an independent contractor. In support of such stated intention, Hormel provided no employee benefits to Plaintiff, nor withheld social security taxes. She performed work for Hormel that required specialized skill, even though she may have also worked in a capacity that did not require specialized skills.

Plaintiff has not provided the Court any evidence, other than her self-serving statements, that she was an employee of Hormel. Noting that the control factor is the most important, Plaintiff attempts to persuade the Court that every step she took while working on a shoot was supervised by Condra. As discussed earlier, the issue is not whether Hormel had the right to control the shoot, the issue is how much supervision was exercised over Plaintiff as she performed her tasks. Plaintiff does not argue that once she was given direction on how to edit a piece, Condra was looking over her shoulder, telling her what buttons to push. Although Plaintiff may have been closely supervised while performing the "grip" duties, the fact that some elements of Plaintiff's working relationship may resemble an employer/employee relationship does not preclude this Court from finding, under the totality of the circumstances, that Plaintiff worked for Hormel as an independent contractor. *See, Wilde,* 811 F.Supp. at 453.

Viewing the facts in their entirety, in a light most favorable to Plaintiff, leads the Court to the conclusion that Plaintiff was, in fact, an independent contractor. Because Plaintiff was not an employee of Hormel, she cannot maintain her Title VII claims.

Appendix B

B. State law claims

The above discussion disposes of the federal claims which were the predicate for this Court's original jurisdiction. 28 U.S.C. § 1367(c)(3) provides that when a district court has dismissed the federal claims which invested it with original jurisdiction, it may decline to exercise jurisdiction over any claim over which it has supplemental jurisdiction. *Wilde v. County of Kandiyohi,* 811 F. Supp. 446, 455 (D. Minn. 1993) *aff'd,* 15 F.3d 103 (8th Cir. 1994). Whether to do so is committed to the discretion of the Court. *Hansen v. LaMontagne,* 808 F. Supp. 89, 95 (D.N.H. 1992). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered" will weigh against the exercise of supplemental jurisdiction. *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 n.7 (1988). There are no special circumstances justifying departure from this general precept. All the state law claims are accordingly dismissed without prejudice.

ORDER

For the foregoing reasons, and based upon all files, records and proceedings herein, it is hereby ORDERED:

1. That Defendants' Motions for Summary Judgment are GRANTED as to Counts I and II of the Amended Complaint; Counts I and II are dismissed with prejudice.

2. That in all other respects, Defendants' Motions for Summary Judgment are DENIED without prejudice. Counts IV, V, VI, VII, VIII and IX are dismissed without prejudice.

Appendix B

LET JUDGMENT BE ENTERED ACCORDINGLY

Date: 5-27-97

s/ Michael J. Davis
Michael J. Davis
United States District Court